Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

JOHN H. HARLAND COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia

PETITION FOR WRIT OF CERTIORARI AND APPENDICES

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QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier to collect its tariff charges may the Interstate Commerce Commission declare the carrier's filed distance rate tariff retroactively void solely because the carrier failed to comply with ICC regulations for the determination of distances?

LIST OF PARTIES

Petitioner Security Services, Inc. (hereinafter "Security") is a corporation previously engaged in common carrier transportation of freight in interstate commerce under the name Riss International Services. Respondent John H. Harland Company (hereinafter "Harland") is a corporation engaged in printing sales.

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PETITION FOR WRIT OF CERTIORARI AND APPENDICES

OPINIONS BELOW

The opinion of the State Court of DeKalb County, Georgia, is unreported and is reprinted as Appendix A. The opinion of the Court of Appeals of Georgia is reported as 423 S.E.2d 325 (Ga. App. 1993) and is reprinted as Appendix B. The order of the Court of Appeals of Georgia denying Petitioner's motion for reconsideration is unreported and is reprinted as Appendix C. The order of the Supreme Court of Georgia denying the petition for writ of certiorari is unreported and reprinted as Appendix D.

JURISDICTIONAL BASIS

The judgment of the Court of Appeals of Georgia was dated, filed and entered on June 9, 1993. The order of the Supreme Court of Georgia denying Security's petition for writ of certiorari was dated, filed and entered on November 19, 1993. This court has jurisdiction under 28 U.S.C. sec. 1257. The petition herein was timely filed pursuant to 28 U.S.C. sec. 2101(c).

STATUTES INVOLVED

49 U.S.C. sec. 10761. Transportation prohibited without tariff.

> Except as otherwise provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff.

49 U.S.C. sec. 10762. General tariff requirements.

* * *

> (e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

STATEMENT OF THE CASE

Security Services, Inc. ("Security") was a motor common carrier operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission ("ICC"). Security operated under Title 49 of the United States Code which governs transportation in interstate commerce.

Pursuant to 49 U.S.C. sec. 10762(a) Security published a tariff containing rates, *inter alia*, stated in cents per mile and filed it with the ICC. The filed tariff specified that a distance guide published by Household Goods Carriers Tariff Bureau and filed with the ICC was to be utilized for a determination of distances. Security failed to follow ICC regulations set forth at 49 C.F.R. sec. 1312.4(d) requiring it to provide the publisher of the distance guide with a current power of attorney at the time of the shipments at issue in this case. Security brought a civil action against John H. Harland Company ("Harland") to collect freight charges based upon this filed tariff.

On October 12, 1992, the State Court of DeKalb County, Georgia, entered summary judgment in favor of Harland and against Security. On June 9, 1993 the Court of Appeals of Georgia affirmed the state trial court finding that the ICC could, by its regulations, retroactively declare tariffs void due to failure to provide the publisher of the distance guide with a power of attorney. On June 24, 1993 the Court of Appeals of Georgia denied Security's motion for reconsideration. On November 19, 1993 the Supreme Court of Georgia denied Security's petition for writ of certiorari.

I. REASONS FOR GRANTING THE WRIT.

A. The Opinion Below Is Inconsistent With This Court's Previous Opinions Interpreting The Tariff Rejection Provisions Of The Interstate Commerce Act.

One of the many requirements of the Interstate Commerce Act is that motor common carriers subject to ICC authority may provide regulated services only pursuant to tariffs filed with the Commission. 49 U.S.C. sec. 10761(a). Common carriers are specifically forbidden to provide such services in the absence of tariffs and "may not charge or receive a different compensation" than the rate specified in the tariff. 49 U.S.C. sec. 10761(a). By requiring filed tariffs and strict compliance with them, the Act seeks to avoid unjust discrimination and to give shippers an advance opportunity to challenge proposed rates. To achieve this protection, the Act provides explicit procedures, remedies and penalties.

Chronologically, the first step in fixing a new rate, or changing an existing one occurs when the motor common carrier files with the Commission a new tariff, which may not take effect until a specific advance notice period has elapsed. 49 U.S.C. sec. 10762(c)(3). A subdivision of the same section that governs tariff filings provides that the Commission may reject such a "submitted" tariff if the tariff "violates this section or a regulation of the Commission carrying out this section." 49 U.S.C. sec. 10762(e). If the Commission accepts the tariff for filing, the next step under the statutory plan allows the Commission to suspend the effectiveness of the new tariff – before it becomes effective – for a period of seven months after the

tariff would otherwise go into effect and to commence an investigation into its lawfulness. 49 U.S.C sec. 10708(b).

The suspension period is limited, however, to a specified time period after which the tariffs go into effect if the Commission has not complete.. its inquiry. At the end of the investigation, the Commission can also prescribe new rates for the future if the filed tariff is found to be unlawful. 49 U.S.C. sec. 10704.

If the tariff goes into effect, the shipper may, at any time, file a court complaint for overcharges, i.e. payment of charges in excess of the filed tariff pursuant to section 11706(b). Alternatively, the shipper can sue for damages under 49 U.S.C. sec. 11705(b)(3) and 49 U.S.C. sec. 11706(c)(2) if the carrier has collected the published tariff rate but that rate is unlawful under the substantive standards of the Act (e.g., because it is unreasonably high). *Reiter v. Cooper,* 507 U.S. ___, 122 L.Ed.2d 604 (1993)

The opinions below are patently inconsistent with the foregoing statutory plan because it fails to give legal effect to a filed tariff as required by 49 U.S.C. sec. 10761(a). The carrier's filed tariff was never rejected by the Commission upon filing as pursuant to sec. 10762(e). The Commission never suspended Petitioner's tariff pursuant to 49 U.S.C. sec. 10708(b). Respondent has never commenced an ICC proceeding to determine the rate to be applied in the future pursuant to 49 U.S.C. sec. 10704, nor has Respondent commenced a civil action for damages incurred by Petitioner's reference to the distance guide in its filed tariffs, pursuant to 49 U.S.C. secs. 11705(b)(3) and 11706(c)(2).

The opinions below collaterally review and give legal effect to 49 C.F.R. sec. 1312.4(d) which declares a filed tariff "void as a matter of law" where that filed tariff refers to another filed tariff the publisher of which has not been furnished a power of attorney by the carrier. In essence the court below found that Security's *filed* tariff containing *filed* rates stated in cents per mile which *filed* tariff lists another *filed* tariff for computation of distances is retroactively void. This Court has held that the Commission has no general power to retroactively reject a *filed* tariff. *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984). Tariffs may be retroactively voided only where the Act provides a specific statutory mandate to the ICC and the retroactive voiding is closely tied to that mandate. *Id.* at 367.

The Court of Appeals relied upon the decision of the United States Court of Appeals for the Fifth Circuit in *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 979 (1993). The "specific" statutory mandate to the ICC which the court in *Vitro* relied upon to retroactively void Petitioner's filed tariff is the National Transportation Policy as codified at 49 U.S.C. sec. 10101. However, the National Transportation Policy provides no specific mandate to the ICC.

In *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354, *reh'g. denied*, 468 U.S. 1224 (1984), in an unanimous decision, it was held that 49 U.S.C. sec. 10762(e) (which authorizes the ICC to reject motor carrier tariffs if they violate statutory or regulatory requirements, such, for example, as 49 C.F.R. sec. 1312 concerning publishing and filing tariffs) does not confer upon the ICC the broad power to nullify filed tariffs

retroactively. When faced with the clear holding of this case, it is difficult to imagine how the ICC continues to maintain, as it did in *Jasper Wyman & Son – Petition for Declaratory Order*, 8 I.C.C. 2d 246 (1990) *reviewed sub nom. Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d 356 (D.C. Cir.), *petition for cert. filed*, 62 U.S.L.W. 3420 (U.S. Dec. 3, 1993) (No. 93-883), that the retroactive voiding provision of 49 C.F.R. sec. 1312.4(d) is valid and permits it to ignore filed tariffs. Although this Court in *American, supra*, in a 5-4 vote,[1] decided that the ICC had requisite authority to reject effective tariffs submitted in substantial violation of a rate-bureau agreement, limitation of this authority was confined only to those situations involving "a specific statutory mandate of the Commission . . . [upon which] the exercise [its] of power must be directly and closely tied to. . . . " *Id.*, at 367.

The ICC in *Jasper Wyman* has failed to identify any statutory mandate allowing it to treat as void a tariff which was indisputably on file. Plainly, 49 C.F.R. sec. 1312.4(d) was promulgated pursuant to 49 U.S.C. sec. 10762(b). Yet, 49 U.S.C. sec. 10762(b) is devoid of any provision governing a carrier's failure to comply with the formal manner of publishing tariffs required by that section. Instead, Congress established 49 U.S.C. sec. 10762(e) to govern rejection of tariffs, wherein it is succinctly stated that: "The Commission may reject a tariff submitted to it by a common carrier under this section if that

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[1] In Part A of the opinion, this Court *unanimously* found that the ICC did not have retroactive authority based upon 49 U.S.C. sec. 10762(e) to nullify effective tariffs if they violated the ICC's tariff publishing regulations.

tariff violates this section or regulation of the Commission carrying out this section." Thus, it is evident from the clear reading of the statute Congress intended that *any* regulation concerning the rejection of tariffs promulgated pursuant to 49 U.S.C. Section 10762(b) was to be governed by 49 U.S.C. sec. 10762(e). Moreover, in *American* this court found that rejection power could not be used retroactively:

> [T]he language of subsection 10762(e) and the structure of the Commission's remedial authority under the Interstate Commerce Act (ICA) as amended, 49 U.S.C. Section 10101 et seq. persuade us that Congress could not have meant subsection 10762(e) to confer on the Commission a broad power to nullify effective tariffs retroactively.

Id., at 361-62.

The ICC stated in *Jasper Wyman* that it did not retroactively reject the carrier's tariff as void. 8 I.C.C. 2d 258. Rather, it claims the filed tariffs are not effective. This Court has, however, determined that where as here the Commission had already accepted the tariff as filed, to interpret the ICC's power to *reject* a tariff as also including a license to *revoke* it, "would be contrary to the plain language of the subsection." *American*, 467 U.S. at 362. Moreover, this Court found that allowing retroactive rejection of filed tariffs under sec. 10762(e) would impermissibly afford the Commission far greater authority than is provided under 49 U.S.C. sec. 10704(b), relating to the Commission's authority to cancel effective tariffs and prescribe new rates for the future based upon a reparations finding.

In *American* it was also noted that since the Commission's power to suspend and investigate rate filings is limited to seven months after the proposed tariff's effective date and final action must be taken only after a full hearing (See 49 U.S.C. sec. 10708), to read 49 U.S.C. sec. 10762(e) as allowing retroactive rejection of effective rates would render the constraints of 49 U.S.C. sec. 10708 "nugatory." 467 U.S. at 363. Here the Commission has not explicitly rejected Security's tariff for failure to provide the publisher of the filed distance guide with a power of attorney before they became effective. Significantly, in order to distinguish *American*, the ICC found in *Jasper Wyman* that the carrier's distance rates were never "effective". However, in *American* it was stated clearly that "effective tariffs" means tariffs that are filed with the agency and have "gone into effect." *Id.*, at 360. The definition of "effective tariffs" is further clarified in footnote 4 of the *American* decision, wherein it is stated:

> Prior to 1979, the Commission had no need to reject *effective tariffs*, because the Commission's staff examined every filing prior to the *effective date* of the proposed tariff and if an obvious defect was discovered the tariff was rejected immediately. . . . Since then, the Commission has reviewed only a random sampling of tariff filings, and tariffs with obvious defects inevitably are *permitted to go into effect.* (Emphasis added).

Id. The Commission itself, prior to the *American* decision, had always held that a tariff which was submitted in a technically defective manner was "not a nullity" and the shipper's recovery was limited to actual damages. *See Boren-Stewart Co. v. Atchison, T. & S.F.R. Co.*, 196 I.C.C. 120

(1933); *Acme Pet Products, Ltd. v. Akron, C. & Y.R. Co.*, 277 I.C.C. 641 (1950). This Court in *American*, at footnote 7, not only cited these two cases with approval, but even adopted the statement from *Acme Pet Products* that "where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender." 467 U.S. at 364.

The Commission definition of an "effective" tariff in *Jasper Wyman* is consistent with the definition adopted by this Court in *American*, and the previous ICC decisions cited therein. In *Jasper Wyman* the Commission stated:

> These tariffs, although not complying with all of the tariff regulations *could be considered on file* because they had met the threshold requirement (i.e., they had been sent to the Commission and had not been rejected at the outset). [Emphasis supplied].

Id. at 259. Here, Security met the same standard: the Security distance rate tariff, including its provision incorporating the filed distance guide by reference, was on file with the Commission and had not been rejected at the outset. Thus it was effective under the Commission's own standard enunciated and ignored in *Jasper Wyman*. It is clear from *American* that the filed tariffs of Security are not to be disregarded or voided merely because of an irregularity in tariff filing requirements.

While it is clear that the ICC has no power pursuant to 49 U.S.C. sec. 10762 to retroactively reject effective rates, neither can Harland find solace in Part B of the

American opinion allowing for rejection under the Commission's so-called "discretionary powers." These discretionary powers, however, derive from 49 U.S.C. sec. 10321(a) and are limited in application only when necessary to achieve other specific statutory goals. *Id.*, at 367. In *American* the other specific statutory purpose was to insure compliance with rate-bureau agreements (governed by a separate statutory provision that provided exemption from the antitrust laws). Here there is no provision of the Act relevant or even evident other than 49 U.S.C. sec. 10762, which deals with the Commission's general authority to prescribe rules and regulations concerning the filing of tariffs. Pursuant to *American* the Commission has no power or authority to retroactively enforce 49 C.F.R. sec. 1312.4(d), either in conjunction with, or as an adjunct to, 49 U.S.C. sec. 10762(e) through rejecting Security's filed tariff. In *Jasper Wyman* the Commission stated that the tariffs under attack in *American, supra,* could not be treated as void because they were filed (i.e. they had been sent to the Commission and had not been rejected at the outset). So here, Security's tariff had been sent to the Commission and not rejected at the outset. Thus under *American* it cannot be treated as void.

The Court of Appeals relied upon the decision in *Freightcor Services, Inc. v. Vitro Packaging,* 969 F.2d 1563 (5th Cir. 1992), *cert. denied,* 113 S.Ct. 979 (1993), which found 49 U.S.C. 10762(b) to be the specific statutory mandate authorizing the ICC to retroactively reject a filed tariff. Plainly 49 U.S.C. sec. 10762 cannot be used as a statutory mandate to retrospectively void Security's filed tariff. This is so because Congress established 49 U.S.C. sec. 10762(e) to govern *all* rejections of tariffs established

under rules promulgated pursuant to sec. 10762. The language of sec. 10762(e) states:

> The Commission may reject a tariff submitted by a common carrier under *this* section if that carrier violates *this* section or regulation of the Commission carrying out *this* section. [Emphasis supplied].

Thus Congress clearly intended *any* regulation concerning the rejection of tariffs promulgated pursuant to sec. 10762 to be governed by subdivision (e) thereof. Thus, the court below erred by failing to find the specific statutory mandate other than sec. 10762 as required by this Court's decision in *American*.

This Court in *American* specifically found that sec. 10762(e) alone could not be used to retroactively void a filed tariff. Instead sec. 10762(e) is limited to rejections of tariff upon filing. Retroactive rejection of filed tariffs was allowed by this Court only when some other statutory mandate beside sec. 10762 existed. With respect to the second prong of *American*, that the retroactive rejection power be closely tied to the specific statutory mandate, the statute's paramount purpose is to provide open rates, known to all. The net effect of the retroactive rejection condoned by the Court below is to enable the carrier and shipper to enter into secret rate agreements thus instead actually frustrating the Act's paramount purpose. Indeed a motor common carrier and a shipper could secretly scheme to render a tariff void in order to provide a preference to the shipper by failing to provide the publisher of a referred to tariff with the power of attorney required by 49 C.F.R. sec. 1312.4.

It is clear from *American* that the filed tariffs of Security is not to be disregarded or voided merely because of an irregularity in tariff filing requirements. *See also, Davis v. Portland Seed Co.*, 264 U.S. 403 (1924); *Berwind-White Coal Mining Co. v. Chicago and E. R.R.*, 235 U.S. 371 (1914).

In *Davis*, this Court held that the illegality of the filed tariff did not void its application. "The statute requires rigid observation of the tariff without regard to the inherent lawfulness of the rates specified. . . . " *Id.*, 264 U.S. at 404. Likewise, here the Act requires adherence to Security's filed distance rate tariff despite the failure by Security to provide the publisher of the distance book referred to in Security's tariff with a power of attorney.

In *Berwind*, as here, the shipper challenged the carrier's collection of charges based upon the "filed" documents because they did not comply with ICC regulations. This Court held:

> But the contention [non-compliance with tariff regulations] is without merit. The documents were received and placed on file by the Commission without any objection whatever as to their form and it is certain that, as a matter of fact, they were adequate to give notice.

Id., 235 U.S. at 375.

Similarly, here mileage rates, published in a tariff referring to another tariff as a governing publication for calculation of mileages, were placed on file at the ICC without any objection being made for many years after filing. Certainly, as documents on file with the ICC they are adequate to give notice of the applicable mileages. Even if Security's reference to another tariff is void, at

worst the term "miles" becomes ambiguous and the shipper would be entitled to any reasonable determination of mileage.

In Ex Parte No. MC-370, *Tariff Improvement*, 365 I.C.C. 43 (1981), the ICC published a rule (49 C.F.R. Section 1312.7(f)(1)) stating that whenever a carrier files a tariff increasing rates without symbolizing the increase as required by ICC regulations, the tariff is unlawful and, unenforceable. This rule was set aside by this Court in *Aberdeen and Rockfish R.R. Co. v. United States*, 682 F.2d 1092 (5th Cir. 1982), *cert. granted, judgment vacated and remanded for findings in light of Interstate Commerce Commission v. American Trucking Association, Inc.*, 467 U.S. 1237 (1984). Thus, the contention in this case that the carrier's distance rates cannot be used because the ICC tariff publication rules were not fully complied with is flatly refuted by this Court's decisions in *American, Rockfish, Berwind* and *Davis*.

B. THE APPELLATE COURTS ARE IRRECONCILABLY SPLIT ON WHAT CONSTITUTES AN EFFECTIVE TARIFF.

In *Security Services, Inc. v. K Mart Corporation*, 996 F.2d 1516 (3d Cir. 1993), *cert. granted*, 114 S.Ct. 341 (1993), the Court of Appeals held that, although the carrier's tariff was on file with the Commission, it was ineffective due to violations of the Commission's tariff publishing

rules.[2] When contrasted against the recent holdings of the District of Columbia Circuit in *Overland Express, supra,* and the Seventh Circuit in *Brizendine v. Cotter & Company,* 4 F.3d 457 (7th Cir.), *petition for cert. filed,* 62 U.S.L.W. 3503 (U.S. Dec. 20, 1993) (No. 93-1129), it is clear that the Courts of Appeals are irreconcilably split on the question of whether a filed tariff, not rejected at the outset, is a valid, i.e. effective, tariff.

In *Overland Express,* the District of Columbia Circuit Court of Appeals reviewed and set aside the ICC's decision in *Jasper Wyman, supra,* pursuant to the Hobbs Act. 28 U.S.C. secs. 2321 and 2342. In *Overland Express* the court found that the ICC's power to retroactively void an effective tariff under its discretionary powers did not permit it to void the carrier's tariff merely because the carrier failed to provide a power of attorney to the publisher of the distance guide, stating:

> We rather doubt that [49 U.S.C.] sec. 10762(a)(1)'s permissive authorization for the Commission to require carriers to include other unspecified information is the type of "specific statutory mandate" the court had in mind in *American Trucking.* And the Commission does not seem authorized to reject tariffs retroactively to satisfy a *regulatory* policy not driven by a specific statutory mandate.

996 F.2d at 362.

In *Brizendine,* the Court found that the ICC lacks the authority under its discretionary powers to retroactively

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[2] Petitioner recognizes that the anticipated decision by this Court in *K Mart* will resolve the split among the appellate courts concerning the question presented herein. This petition was filed to preserve Petitioner's action to collect freight charges in the event Petitioner prevails in *K Mart.*

void a filed tariff where the tariff refers to a distance guide in which the carrier did not participate. In *Brizendine* the Court found support for its position in this Court's decision in *American Trucking, supra,* and *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990):

> *American Trucking* makes clear that a carrier's submitted rate becomes the legal, governing rate when the ICC accepts it. [citation omitted] *Maislin* adds that the filed rate doctrine trumps any contrary regulation promulgated by the ICC. The fact that the ICC interprets 49 C.F.R. sec. 1312(d) as a regulation that helps to *define* whether a rate is filed does not allow the ICC to escape the strictures of *Maislin*.

4 F.3d at 463. In noting whether the ICC's retroactive voiding was closely tied to the mandate claimed by the Third Circuit in the opinion below, that is, promotion of non-discriminatory rates, the Court in *Brizendine* stated:

> It is difficult to understand, despite Cotter's claim, how the practice of failing to file a power of attorney would lead to price discrimination. Again, Brown's tariff rate was not secret. Anyone who consulted it could compute the price of shipping. The presence or absence of a separate power of attorney would change nothing. In fact, relieving shippers of the requirement that they must pay rates on file because a formality is missing would do far more to upset the uniformity of pricing than refusing to enforce their tariffs. Like the policy struck down in *Maislin*, the ICC's policy here would "sanction [ ] adherence to unfiled rates, [and thus] undermine [ ] the basic structure of the Act" *Maislin*,

> 497 U.S. at 132, 110 S.Ct. at 2769, see also *Overland,* slip op. at 10.

4 F.3d at 464. Thus the decision in *Overland Express,* which directly reviewed the ICC decision in *Jasper Wyman,* and the decision in *Brizendine* stand in stark contrast to the holdings in *Freightcor Services, Inc. v. Vitro Packaging,* 969 F.2d 1563 (5th Cir. 1992) and the court below wherein the courts found 49 U.S.C. sec. 10762(a)(1) was a "specific statutory mandate" allowing the ICC to retroactively reject an effective tariff.

Various federal and state courts of appeals have addressed the issue raised by this petition[3]. Three Circuits, namely the District of Columbia Circuit, the Sixth Circuit[4] and the Seventh Circuit, have held that the ICC may not declare a filed tariff void retroactively because that tariff refers to a distance guide tariff in which the carrier did not participate. Two Circuits, namely the Third Circuit and the Fifth Circuit, have held that such tariffs are effective because they are on file, but that the ICC can declare the tariffs retroactively void and allow negotiated, unfiled rates to control in order to foster the non-discrimination provisions of the Interstate Commerce Act. Finally one Circuit, namely the Eighth Circuit, as well as the ICC, declare that such filed tariffs need not be declared retroactively void because they never became

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[3] This question is also pending in other circuits, *see Growe v. Malden Mills Industries, Inc.,* No. 93-1556 (1st Cir.); *F.P. Corp. v. Golden West Foods, Inc.,* Nos. 92-2000, 92-2045 (4th Cir.); *Security Services, Inc. v. All Freight Services, Inc.,* No. 92-55785 (9th Cir.); *Pope v. Amoco Fabrics and Fibres Co.,* No. 92-681 (11th Cir.).

[4] *See Security Services, Inc. v. P-Y Transportation,* 3 F.3d 966 (6th Cir. 1993).

effective in the first place. Although this Court has granted certiorari in *K Mart, supra,* to resolve this clear conflict among the Circuit Courts of Appeals, certiorari should be granted in the matter at bar because the decision below is inconsistent with the decision of this Court in *American Trucking, supra.*

CONCLUSION

For the foregoing reasons, the Petition of Security Services, Inc. should be granted and a Writ of Certiorari issued to the Court of Appeals of Georgia.

Dated: February 17, 1994.

Respectfully submitted,

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APPENDIX A

IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

SECURITY SERVICES, INC., f/k/a RISS INTERNATIONAL CORPORATION,	:	
Plaintiff,	:	CIVIL FILE NO. 91A 50388-5
v.	:	
JOHN H. HARLAND COMPANY,	:	
Defendant.	:	

ORDER

The above-styled action came on regularly before this Court on Defendant's Motion for Summary Judgment as well as Motion to Dismiss arising from a complaint wherein the trustee for a bankrupt carrier, to wit: Riss International Corporation, seeks alleged undercharges from the Defendant shipper. Upon due consideration of all matters of record, the Court finds that Plaintiff failed formally to participate in the Household Goods Carriers' Bureau Mileage Guide (HGCB) by failure to execute a power of attorney or concurrence in favor of HGCB as mandated by Interstate Commerce Commission Regulation 49 C.F.R. Section 1312.4(d), which provides:

"[A] carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law."

In *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, No. 91-1507 (opinion June 26, 1992), the Fifth Circuit Court of Appeals concluded that the HGCB Mileage Guide is a tariff, and that a carrier's failure formally to participate therein, after referring thereto in its own tariff, renders the carrier's own tariff void as a matter of law, pursuant to the regulatory provisions of Section 1312.4(d). The Court finds the Fifth Circuit Court opinion persuasive and concludes that Riss International Corporation's tariff is void as a matter of law, wherefore undercharges cannot be asserted under the filed rate doctrine. Thus there are no genuine issues of material fact remaining, and Defendant is entitled to judgment as a matter of law. O.C.G.A. § 9-11-56. It is, therefore,

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment be, and hereby is, GRANTED.

As the grant of said motion disposes of the case at bar in its entirety, the Court will not consider Defendant's Motion to Dismiss.

SO ORDERED, this 12 day of October, 1992.

/s/ Mathew Robins
MATHEW ROBINS, JUDGE
STATE COURT OF DEKALB COUNTY

cc: Arthur B. Seymour, Esq.
Alan D. Harris, Esq.
Thomas L. Smith, Jr., Esq.
George Carl Pezold, Esq.

APPENDIX B

In the Court of Appeals of Georgia

A93A0718. SECURITY SERVICES v. JOHN H. HARLAND COMPANY.

BLACKBURN, Judge.

The appellant, Security Services, Inc., formerly known as Riss International Corporation (Riss), commenced this action against the John H. Harland Company (Harland), seeking to recover alleged freight undercharges. The trial court granted summary judgment for Harland, and Riss appeals.

Riss was a motor common carrier, which, from November 1986 to September 1988, entered into a series of 68 contracts to transport goods for Harland. After Riss filed a Chapter 11 petition under the United States Bankruptcy Code, an audit revealed that Riss had undercharged Harland a total of $41,307.84 for those shipments. When Harland refused Riss's demand for payment of those alleged undercharges, this action ensued.

The pertinent Interstate Commerce Commission (ICC) tariff filing regulations are contained in Part 1312 of Title 49 of the Code of Federal Regulations. 49 CFR 1312.30 generally provides that when motor common carrier publishes mileage rates rather than rates stated in cents per 100 pounds, it may either (a) publish the distances between all points for which mileage rates are published, (b) attach a map to the tariff, or (c) refer to a distance guide filed with the ICC.

49 CFR 1312.27 (c) requires carriers who choose to incorporate a third party's tariff to participate in that

tariff, and under 49 CFR 1312.10 (a) such participation is accomplished by executing a power of attorney. Lastly, 49 CFR 1312.4 (d) provides in part that "a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law."

Motor common carriers authorize agents to publish tariffs on their behalf, by executing the requisite powers of attorney. When an agent is so authorized to publish a tariff on behalf of a carrier, it identifies the carrier as a participating carrier in that tariff. Household Goods Carriers' Bureau (HGCB) is such an agent, and the distance-based rate tariff claimed by Riss in this case purported to refer to or incorporate the HGCB mileage rate, i.e., the ICC HGCB 100 series. However, it is uncontroverted that Riss's power of attorney authorizing the HGCB to publish mileage tariffs on its behalf was terminated, and that Riss's participation in the HGCB tariff was cancelled, effective February 19, 1985, well before the alleged undercharges in this case.

On appeal, Riss contends that the HGCB mileage guide is not a tariff, and that even if that mileage guide is a tariff, voiding the tariff charged to Harland because of its failure to participate in the HGCB tariff would constitute an impermissible retroactive rejection of a tariff. These same issues were raised by a motor common carrier seeking undercharges in *Freightcor Services v. Vitro Packaging*, 969 F2d 1563 (5th Cir. 1992).

In *Freightcor*, the court held that the HGCB mileage guide constituted a tariff, based upon the definition

provided in 49 CFR 1312.1 (b): "(35) 'Tariff' means a publication containing rates, classification ratings, rules, regulations, and other provisions as amended, filed in the carrier's or an agent's name." Inasmuch as the motor common carrier referred to the HGCB mileage guide, but did not participate in it by executing the requisite power of attorney, the carrier's tariff was void under 49 CFR 1312.4 (d). As a result, the carrier could not recover any alleged undercharges.

With regard to the issue of retroactive rejection of a tariff, the *Freightcor* court distinguished between rejecting a tariff and determining when a tariff is effective. 49 CFR 1312.4 (d) defines when a tariff is effective or void, through either the action or inaction of the carrier, and thus actually does not involve rejection of a tariff. Nevertheless, under *ICC v. American Trucking Association*, 467 U. S. 354 (104 SC 2458, 81 LE2d 282) (1984), an ICC regulation is valid if it furthers a specific statutory mandate of the ICC, and is directly and closely tied to that mandate. Even if finding a tariff void pursuant to 49 CFR 1312.4 (d) constitutes retroactive rejection of a tariff, that regulation meets the criteria delineated in *American Trucking Association*, supra.

In the instant case, the trial court found *Freightcor* on point and persuasive. We agree, and conclude that the trial court properly granted summary judgment for Harland.

Judgment affirmed. Johnson and Smith, JJ., concur.

APPENDIX C

Court of Appeals

of the State of Georgia

ATLANTA, JUNE 24, 1993

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A93A0718

SECURITY SERVICES, INC. F/K/A RISS INTERNATIONAL CORPORATION V. JOHN H. HARLAND COMPANY

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

JUN 24 1993

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ Victoria McLaughlin

APPENDIX D

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: NOVEMBER 19, 1993

Arthur B. Seymour
1600 First Federal Bldg.
40 Marietta Street
Atlanta Ga 30303

Case No. S93C1549

SECURITY SERVICES, INC., f/k/a RISS INTERNATIONAL CORP. V. JOHN H. HARLAND COMPANY

COURT OF APPEALS CASE NO. A93A0718

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunt, P.J., Sears-Collins and Hunstein, JJ., dissent.

Sincerely,

Sherie M. Welch, Clerk

Supreme Court, U.S.
FILED
APR 8 1994
OFFICE OF THE CLERK

No. 93-1335

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

JOHN H. HARLAND COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a carrier's participation in the Household Goods Carriers' Bureau Mileage Guide Tariff was cancelled, is the carrier's continued use of that tariff a violation of the filed rate doctrine?

No. 93-1335

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

JOHN H. HARLAND COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Georgia

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the State Court of DeKalb County of Georgia, the Court of Appeals of Georgia and the orders denying reconsideration and *certiorari* by the Court of Appeals and the Georgia Supreme Court, respectively, all appear as Appendices in the *Petition for Certiorari.*

STATEMENT OF THE CASE

This case involves an undercharge action filed by Security Services, Inc. (hereinafter "Security") against Respondent, John H. Harland Company ("Harland").

Upon Harland's motion for summary judgment, the State Court of DeKalb County held that since Security did not execute a power of attorney to participate in the Household Goods Carriers' Bureau Mileage Guide, Security's tariff was void as a matter of law relying on the Fifth Circuit's precedent in *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, No. 91-1507 (5th Cir. 1992), *withdrawn and op. replaced on reh'g*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). The Court of Appeals affirmed the trial court's finding that *Freightcor* was on point, but also held that the Commission's regulation met the strictures on retroactive rejection announced by this Court in *I.C.C. v. American Trucking Association*, 467 U.S. 354 (1984). Pet., p. 3. The Georgia Court of Appeals and Georgia Supreme Court subsequently denied further review of the case.

REASONS FOR GRANTING THE WRIT

The Issue Herein Is Identical To The Issue In *KMART*

This Court's recent acceptance of *Security Services, Inc. v. Kmart* presents the same issue and will be dispositive of the case at bar. *Security Services, Inc. v. Kmart*, 996 F.2d 1516 (3rd Cir. 1993), *cert. granted*, 62 U.S.L.W. 3287 (Oct. 18, 1993), *argued*, (Feb. 28, 1994) (No. 93-284). Respondent agrees with Petitioner that this Court should grant *certiorari* in this case, but suggests that the Court stay all briefing until the Court issues its opinion in *Security Services, Inc. v. Kmart*.

CONCLUSION

For the foregoing reasons, the Petition of Security should be granted and a Writ of Certiorari issued to the Court of Appeals of Georgia.

Respectfully submitted,

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